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No. 85-112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LITTLE CROW MILLING CO., INC., MIDSTATE MILLS, INC., and THE PILLSBURY COMPANY,

Petitioners,

v.

BALTIMORE & OHIO RAILROAD, CHESAPEAKE & OHIO RAILWAY CO., CHICAGO SOUTH SHORE & SOUTH BEND RAILROAD, CONSOLIDATED RAIL CORP., ILLINOIS TERMINAL RAILROAD COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, and SOUTHERN RAILWAY CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether the Seventh Circuit correctly held that shippers (like the Petitioners here) cannot maintain an antitrust damage action based upon rates duly filed with and approved by the Interstate Commerce Commission.

STATEMENT REQUIRED BY RULE 28.1

Listed below are all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of each corporation on whose behalf the instant Brief in Opposition to the Petition for a Writ of Certiorari is filed:

NORFOLK AND WESTERN RAILWAY COMPANY

Parent

Norfolk Southern Corporation

Subsidiaries (Other Than Wholly-Owned)

Norfolk and Portsmouth Belt Line Railroad Company
Wabash Railroad Company
The Wheeling and Lake Erie Railway Company

Affiliates

The Akron & Barberton Belt Railroad
The Belt Railway Company of Chicago
Chicago and Western Indiana Railroad
The Cleveland Union Terminals Company
Des Moines Union Railway Company
Fairport, Painesville and Eastern Railway
Fort Wayne Union Railway Company
Fruit Growers Express Company
Green Real Estate Company
High Point, Thomasville & Denton Railroad
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company

Peoria and Pekin Union Railway Company
Piedmont Aviation, Inc.
Terminal Railroad Association of St. Louis
Trailer Train Company
Union Belt of Detroit
Winston-Salem Southbound Railway

SOUTHERN RAILWAY COMPANY

Parent

Norfolk Southern Corporation

Subsidiaries (Other Than Wholly-Owned)

High Point, Randleman, Asheboro and Southern Railroad Company
Mobile and Birmingham Railroad Company
North Carolina Midland Railroad Company
South Western Rail Road Company
State University Railroad Company
Yadkin Railroad Company

Affiliates

Algers, Winslow and Western Railway Company
Atlantic and North Carolina Railroad Company
Augusta and Summerville Railroad Company
Beaver Street Tower Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
1575 Eye Street Associates
Fruit Growers Express Company
North Carolina Railroad Company
North Charleston Terminal Company
700 North Fairfax Street
Richmond, Fredericksburg and Potomac Railroad Company
Richmond-Washington Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Woodstock & Blocton Railway Company

ILLINOIS TERMINAL RAILROAD COMPANY

Illinois Terminal Railroad Company does not have a parent company, subsidiaries, or affiliates. Illinois Terminal Railroad Company ceased to exist as a corporate entity with the filing of a Certificate of Dissolution with the State of Delaware on May 24, 1982.

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BRIEF IN OPPOSITION

Petitioners seek to have this Court review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on April 17, 1985. Respondents demonstrate below that this case does not warrant review by this Court.

COUNTERSTATEMENT OF THE CASE

The genesis of this case lies in nine years of challenges by shippers before the Interstate Commerce Commission ("ICC" or "Commission") concerning the railroads' rate structure for wheat and wheat products. In 1976, the ICC found that the maintenance by the Eastern Railroads

of outbound proportional or reshipping rates from Chicago to eastern destinations on wheat and wheat products having a prior movement by rail, lake vessel or barge was unlawfully discriminatory against wheat traffic having a prior movement by truck. The railroads were ordered to revise the wheat rate structure so as to eliminate the unlawful discrimination. *Board of Trade of the City of Chicago v. Akron, Canton and Youngstown R.R.*, 352 I.C.C. 881 (1976), *aff'd sub nom. Atchison, T. & S.F. Ry. v. United States*, 549 F.2d 1186 (8th Cir.), *cert. denied*, 434 U.S. 874 (1977). To comply with the ICC's decision, the railroads submitted wheat freight rate Plan A that proposed the elimination of all outbound proportional rates from Chicago on wheat and wheat products and which would have made the higher flat rates applicable to all eastbound movements, regardless of how such shipments had moved to Chicago. Upon the protest of certain shippers, the ICC ordered an investigation and suspended the effectiveness of Plan A. *Wheat and Wheat Products, Official Territory*, Investigation and Suspension, I.C.C. Dkt. No. 9194 (unprinted decision of August 2, 1978).

In January 1979, the ICC granted the railroads special permission to cancel the suspended Plan A and to file a new Plan B rate structure, under which shipments that were transited east of Chicago or other gateways would be moved under the higher flat rates.[1]

Certain shippers, including The Pillsbury Co. ("Pillsbury"), filed petitions for investigation and suspension of Plan B arguing that the application of the flat rates on transit movements would result in rates that were unreasonably high and discriminatory. The ICC refused to

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[1] "Transit" is a term relating to the right of a shipper to interrupt a through movement of a commodity between origin and destination for storage or processing while still utilizing the rate which would have applied had the movement been continuous.

suspend the Plan B tariffs but placed them under investigation. *Transit on Wheat Between Reshipping Point and Destination*, I.C.C. Dkt. No. 37146 (Order served March 16, 1979) (*"Transit on Wheat I"*). The ICC also found that because the protestants had failed to establish that the railroads had market dominance, the Congressionally mandated standards imposed in the 1976 amendments to the Interstate Commerce Act precluded Commission determination of whether the Plan B rates exceeded a maximum reasonable level. *See* 49 U.S.C. § 10709.

During hearings the shippers argued, *inter alia*, that: the Plan B rates were unlawfully discriminatory; the railroads violated the Agreement of Eastern Railroads under Section 5b of the Interstate Commerce Act, 49 U.S.C. § 10706(a) (the "Agreement"), because they failed to comply with the notice requirements of the Agreement; and shippers would incur substantial damages as a result of the elimination of transit on proportional rates. The railroads responded that the Plan B tariffs were exempt from the bureau docketing procedures inasmuch as they constituted an emergency proposal to comply with the ICC's order in No. 35825, and inasmuch as such tariffs "grew out of" the ICC's order in that proceeding.

On January 16, 1980, the ICC approved the rates finding that Plan B was lawful and was not unreasonably discriminatory. *Transit on Wheat Between Reshipping Point and Destination*, 362 I.C.C. 529 (1980) (*"Transit on Wheat II"*).[2] Although the ICC rejected the railroads'

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[2] In *Transit on Wheat II* (362 I.C.C. at 555), the ICC also made clear that, "protestants have not disputed our prior determination that neither market dominance nor unreasonableness exists in relation to these [Plan B] schedules. . . ." Indeed, this point was made by the Board of Trade which argued, *inter alia*, that, "whether the rates were 'unreasonably high' was not at issue, no protestant claimed that they were." Brief for the Board of Trade of the City of Chicago, Petitioner in No. 80-1309, dated June 30, 1980, at 27.

contention that their ratemaking activities were exempt from the notice requirements of the Agreement, it excused compliance with the Agreement procedures noting that the exceptions relied upon by the railroads were vague, and that the shippers had received constructive notice of Plan B.[3]

On appeal, the shippers argued, *inter alia*, that the ICC erred in finding that Plan B was lawful and nondiscriminatory and that the railroads did not violate the notice provisions of their 5b Agreement. The Seventh Circuit reversed the ICC's determination only as to the issue of notice and ordered further proceedings to reconsider whether the provisions of the rate bureau agreement exempting certain proposals from the notice requirements were applicable. *Board of Trade of the City of Chicago v. I.C.C.*, 646 F.2d 1187 (7th Cir. 1981).

On remand, the ICC reopened the proceedings for the receipt of additional evidence as to the applicability of the notice provisions of the Agreement. The ICC also requested comments as to whether it was required to order Plan B stricken and to award reparations in the event that it declared Plan B unlawful. *Transit on Wheat Between Reshipping Point and Destination*, I.C.C. Dkt. No. 37146 (Order dated December 8, 1981) (*"Transit on Wheat III"*). Pursuant to the ICC's orders, the shippers submitted evidence purporting to show that they had been injured as a result of the publication of Plan B.[4]

The ICC served its decision and order on remand in August 1982. *Transit on Wheat IV*. The ICC reiterated

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[3] The ICC found that the rail carriers' "October 4, 1978 petition in I.&S. No. 9194 provided protestants with constructive notice of the proposal's outlines." (362 I.C.C. at 563).

[4] In *Transit on Wheat Between Reshipping Point and Destination*, 365 I.C.C. 890, 898-899 (1982) (*"Transit on Wheat IV"*), the ICC listed the claims of damages that had been presented by four shippers, including Pillsbury which had submitted a claim in the amount of $462,000.

its prior finding that the Plan B rates were lawful under the substantive standards of the Interstate Commerce Act. The ICC found, however, that the railroads had not complied strictly with the notice requirements of the Agreement and, ruling prospectively, ordered the tariffs cancelled within thirty days. The ICC declined to rule the Plan B tariffs void *ab initio* and refused to award reparations to the shippers, finding that they had failed to prove actual injury stemming from the unlawful tariff publication.

Rather than seeking review of the ICC's decision, certain shippers filed antitrust complaints against the railroads two months later alleging that the railroads' conduct constituted a per se violation of the antitrust laws, and that the railroads had lost any immunity conferred by § 10706(a)(2)(A) when they failed to comply with the notice requirements of the Agreement.

The district court dismissed Petitioners' damage claims based upon this Court's decision in *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), finding that *Keogh* precludes recovery by shippers of antitrust damages based upon rates that were duly filed with and approved by the ICC pursuant to the regulatory scheme mandated by Congress. *In re Wheat Rail Freight Rate Antitrust Litigation*, 579 F. Supp. 517 (N.D. Ill. 1984).

A unanimous panel of the Seventh Circuit affirmed the dismissal of the damage claims. After reviewing the history of *Keogh* and its progeny and the current regulatory regime, the court of appeals concluded that "the reasoning and conclusions of the Supreme Court in *Keogh* are still valid and applicable today." *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305, 1316 (7th Cir. 1985). This petition followed.

DISCUSSION

Reasons For Denying The Writ

The issues raised by the Petition involve the application of settled law to the particular facts of this case and pose no novel question of law or question of national importance warranting this Court's review. The holding of the court of appeals that Petitioners may not recover antitrust damages as a result of rates duly filed with and approved by the ICC is based on the *Keogh* decision which has been applied consistently by the courts for over sixty years. The court of appeals decision is fully consistent with the decisions of this Court and the circuit courts. There are no conflicting decisions in the circuits involving the meaning and scope of the *Keogh* decision, and there is no compelling reason why this Court should disturb the *Keogh* decision. In fact, as recently as last term, this Court denied a petition for certiorari in *Minsky v. Auto Driveaway Co.*, 757 F.2d 718 (7th Cir.), *cert. denied*, 105 S. Ct. 435 (1984), which asked this Court to overrule *Keogh*. There is plainly no reason to grant certiorari here to consider an issue which is fully in accord with the decisions rendered by this Court and the circuits over the past six decades.

I. The Seventh Circuit's Decision Is Fully Consistent With The Decisions Of This Court And The Decisions Of Lower Courts That Have Addressed This Issue.

In the past sixty years, no court which has had the opportunity to review this issue has held that a shipper may recover antitrust damages based upon rates duly filed with and approved by the ICC. The decision of the Seventh Circuit here which simply affirms this well settled principle of law is in full accord with the seminal *Keogh* case in which this Court firmly established this basic principle.

In *Keogh*, a shipper of excelsior and flax tow sued eight railroads under the antitrust laws to recover dam-

ages based on the difference between the filed rates it paid and some hypothetical lower rates that allegedly would have prevailed absent the alleged conspiracy. After noting that regulated carriers are subject to government prosecution for conduct violative of the antitrust laws, Justice Brandeis, writing for a unanimous court, affirmed the dismissal of plaintiff's antitrust damage action.

This Court held that a private shipper may not recover antitrust damages because he lost the benefit of lower rates which might have prevailed in a competitive market. This Court held that, because the challenged rates were contained in published tariffs duly filed with the ICC, they could not be the basis of an award of antitrust damages. 260 U.S. at 160, 162. This Court emphasized that the lawfulness of railroad rates is to be determined under the provisions of the Interstate Commerce Act, not the antitrust laws: "A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Antitrust Act. What rates are legal is determined by the Act to Regulate Commerce." *Id.* at 162. Reasoning that injury implied violation of a legal right and finding that plaintiff's rights were "measured by the published tariff," this Court held that the plaintiff suffered no judicially cognizable injury as a result of the alleged conspiracy. *Id.* at 163. In buttressing its decision, the *Keogh* Court pointed out, *inter alia*, that the plaintiff could have obtained "the full amount of the damages sustained, whatever their nature," in a proceeding before the ICC challenging the rates (*id.* at 162), and that plaintiff could not demonstrate that if a lower rate would have prevailed absent the conspiracy, such rate would have conformed to the requirements of the Interstate Commerce Act (*id.* at 164).

In the instant case, because the damages Petitioners claim to have suffered are inescapably linked to the Plan B rates which had been duly filed with and approved by the ICC, the Seventh Circuit properly affirmed the district

court's holding that *Keogh* mandates the dismissal of these actions. The Seventh Circuit, in a carefully reasoned opinion, fully agreed with the district court's conclusions that, as in *Keogh*: the shippers' damages here are speculative because they are predicated on proof that a lower rate would have prevailed absent the conspiracy and that such rate would have been lawful under the Interstate Commerce Act; the ICC's authority to provide remedies to shippers because of unlawful rates precludes recovery of antitrust damages based on such rates; and a failure to dismiss these actions would undermine carrier reliance on and frustrate the regulatory process.

The Seventh Circuit's decision is not only consistent with *Keogh*, it is also consistent with this Court's decision in *Georgia v. Pennsylvania Ry. Co.*, 324 U.S. 439 (1945), in which *Keogh* was reaffirmed. In that case, the State of Georgia, suing for damages and injunctive relief, charged the defendants with an illegal conspiracy to keep transportation rates high by coercing rate bureau members not to lower their rates. 324 U.S. at 444-45.[5] This Court held that the State of Georgia, which was suing in part as a shipper, could not recover damages based on tariff rates duly filed with the ICC noting: "We think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist. . . . The reasoning and precedent of that case apply with full force here." 324 U.S. at 453.[6]

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[5] The *Keogh* decision on which the Seventh Circuit and the district court principally relied has frequently been cited by this Court with approval. *See McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 243 (1980); *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 299-300 & n. 12 (1973); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259 (1972); *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 485 (1932).

[6] In *Georgia*, this Court noted, however, that *Keogh* was not a bar to government actions nor did it preclude private shippers from obtaining injunctive relief.

Indeed, the Seventh Circuit's decision in this case is fully consistent with the decisions of every court which has examined the issue of whether shippers may recover antitrust damages based upon rates duly filed with the ICC. Thus, in addition to this case, the Seventh Circuit in *Minsky v. Auto Driveaway, supra,* citing *Keogh* with approval, affirmed the district court's decision dismissing plaintiff's antitrust damage actions that were predicated on rates filed with the ICC. *See also Board of Trade v. I.C.C., supra* (noting that a shipper cannot recover antitrust damages based upon rates approved by the ICC). Recently, the Second Circuit in *Square D Company and Big D Building Supply Corp. v. Niagara Frontier Tariff Bureau,* 760 F.2d 1347 (2d Cir.), *petition for cert. filed,* 54 U.S.L.W. 3019 (U.S. July 23, 1985) (No. 85-21), dismissed plaintiffs' damage claims predicated on filed rates on the basis of *Keogh.* Similarly, just two months ago, the district court in *In re Lower Lake Erie Iron Ore Antitrust Litigation,* MDL 587 slip op. (E.D. Pa. June 5, 1985), found that to the extent plaintiffs' damage claims there were based on ICC-regulated rates, they are barred by *Keogh. See also Asbury Graphite, Inc. v. Dehyco Co.,* 1981-1 Trade Cases (CCH) ¶ 63,980 (N.D. Cal. 1980); and *Monticello Heights, Inc. v. Morgan Drive Away, Inc.,* 1974-2 Trade Cases (CCH) ¶ 75,282 (S.D.N.Y. 1974).

Thus, the approach taken by the Seventh Circuit is entirely consistent with prior decisions of this Court and the lower federal courts. There is plainly no compelling reason warranting this Court's review, and Petitioners cannot successfully contend otherwise.

II. There Is No Conflict Between The Seventh Circuit's Decision And The Decisions Either Of This Court Or The Circuits.

Faced with uniform authority fully supporting the result reached by the court of appeals here, Petitioners attempt to create a conflict between the Seventh Circuit's

decision and the decisions rendered by other courts by: (1) comparing the decision below with *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), a case which is totally inapposite; and (2) distorting this Court's decision in *I.C.C. v. American Trucking Associations*, 104 S. Ct. 2458 (1984). Petitioners' analysis will not withstand scrutiny.

Petitioners err in asserting that the decision below dismissing their damage claims on the strength of *Keogh* conflicts with this Court's decision in *Carnation*. The Seventh Circuit carefully considered and correctly rejected that precise argument. In *Carnation*, the plaintiff alleged that the defendants had conspired to fix rates pursuant to an agreement never approved by the Federal Maritime Commission ("FMC"). The defendants moved to dismiss the antitrust action claiming that the Shipping Act of 1916 precluded the application of the antitrust laws to the shipping industry. This Court held that antitrust remedies were "entirely collateral" to administrative remedies available under the Shipping Act (383 U.S. at 224), and that an award of treble damages would not create a conflict between the antitrust laws and the Shipping Act (*id.* at 222).

In this case, the Seventh Circuit properly found that *Carnation*, which did not mention *Keogh*, was clearly distinguishable. In this regard, the critical distinctions between the regulatory schemes under the Interstate Commerce Act and the Shipping Act have long been recognized. For example, in reviewing and rejecting plaintiffs' claim that *Carnation* overruled *Keogh*, the Second Circuit in *Square D* found that *Carnation* was inapplicable because "[t]he ICA and the Shipping Act differ significantly with respect to the relative powers of the ICC and the FMC concerning rate regulation" (760 F.2d at 1362-1363).[7] *See also In re Ocean Shipping*, 500 F. Supp. at

[7] At the time *Carnation* was decided, the FMC had "only limited ratemaking authority over carriers" in foreign commerce. Report

1241 (distinguishing *Carnation* since "[t]he FMC wields relatively weak power to supervise tariffs").[8] Thus, there

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of the Antitrust Division, Department of Justice, *The Regulated Ocean Shipping Industry* at 47 (1977). Unlike the ICC, the FMC could not suspend a proposed rate or establish a reasonable rate (*id.* at 37). Further, the FMC could only "disapprove, 'unjustly discriminatory' or 'unreasonably high or low' rates in very limited circumstances," and, even then, "the carrier's rate remain[ed] in effect pending the outcome of any proceeding" (*id.*) (footnotes omitted). Indeed, the FMC has repeatedly confirmed that its ratemaking authority has been very limited. Thus, in *In re Ocean Shipping Antitrust Litig.*, 500 F. Supp. 1235 (S.D.N.Y. 1980), the FMC appeared to reject defendants' claim that the Shipping Act's regulatory scheme precluded the plaintiffs' recovery of treble damages under the antitrust laws, stating:

> In support of their theory, defendants rely on cases establishing implied immunity from treble damage actions by other regulatory acts, e.g., the Interstate Commerce Act . . . . It should be pointed out that under the Shipping Act, the Commission does not have the power to approve rates, to set rates, or to award damages retroactively for rates found to be unreasonably high in the U.S. foreign commerce.

Memorandum of Points and Authorities In Support of Motion to Intervene and Motion for Stay Pending Federal Maritime Commission Hearing and Investigation (filed by FMC) at 7, n. 10, *In re Ocean Shipping Antitrust Litig.* Similarly, the FMC has emphasized "that Congress did not intend the Federal Maritime Commission to have ratemaking powers over foreign commerce similar to those of the Interstate Commerce Commission over interstate commerce." *Far East Conference*, 21 F.M.C. 522, 524 (December 5, 1978). *See also* S. Rep. No. 860, 87th Cong., 1st Sess. 5 (1961), *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 3108, 3112 (stating that "[w]hereas Congress has vested rate control powers and responsibilities in Government regulatory agencies concerned with domestic surface and air transportation, it has heretofore given to the maritime regulatory agencies no similar mandate over international shipping rates").

[8] *See also In re Lower Lake Erie Iron Ore Antitrust Litigation, supra*, distinguishing *Keogh* and *Carnation* on the basis of different regulatory regimes and on the basis that *Carnation* involved unapproved agreements.

is no inconsistency between the decision below and this Court's decision in *Carnation*.[9]

Similarly, Petitioners claim that the decision below conflicts with this Court's decision in *ATA*. Petitioners' reliance on the *ATA* decision is also misplaced. The narrow issue confronting this Court in *ATA* was whether the ICC had the power to reject retroactively under the Motor Carrier Act of 1980 an effective tariff filed in substantial violation of a rate bureau agreement (104 S. Ct. at 2462). In *ATA*, this Court upheld the power of the ICC to invoke the extraordinary remedy of retroactive rate nullification when tariffs have been submitted in substantial violation of rate bureau agreements.[10] In *ATA*, however, this Court made clear that the ICC's power to so act is not mandatory; in fact, this Court noted with approval the ICC's refusal to nullify retroactively the same Plan B rates involved in this case (*id.* at 2468 & n. 13).

Because *ATA* holds that the ICC has the discretion, but not the duty, to reject tariffs submitted in substantial violation of rate bureau agreements, it necessarily follows that the ICC has the discretion to refuse to reject retroactively tariffs even when such tariffs do not comply strictly with the technical provisions of rate bureau agreements. In this case, the ICC in 1980 had approved the Plan B tariffs and declared them lawful. On remand from the Seventh Circuit in 1982, the ICC re-

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[9] The Seventh Circuit also recognized that because of the particular circumstances involved in *Carnation*, the FMC could not award reparations to the plaintiff-shipper there. *See e.g., Joint Agreement Between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference*, 8 F.M.C. 553 (July 28, 1965).

[10] The *ATA* Court did not purport to make a definitive ruling as to the consequences of a finding of unlawfulness. This Court merely stated in *dictum* that a finding of unlawfulness enables injured parties to recover damages under the Interstate Commerce Act "and whatever additional amounts the antitrust laws allow" (*id.*).

fused to declare the Plan B tariffs void *ab initio*, reiterated its finding that the rates were lawful under the substantive provisions of the Interstate Commerce Act, and ordered the rates cancelled prospectively only. Thus, during the period preceding the effective date of the ICC's 1982 decision, the Plan B rates were and must be considered as having been approved by the ICC. Under *Keogh*, such approval bars a shipper's suit for antitrust damages based upon such rates, and *ATA* raises no conflict for this Court to resolve.[11] Indeed, after carefully reviewing *ATA*, the Seventh Circuit correctly found that its "study of Supreme Court precedent and decisions in this circuit persuades us . . . that . . . the assumption throughout the cases is that *Keogh* today, as in 1922, is good law." (759 F.2d at 1311-1312).

III. The 4R Act Has Not Rendered *Keogh* Inoperable.

In the absence of any conflict among the courts which have addressed the issues presented by the Petition, Petitioners are left to argue here, as they did below, that the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 (1976) ("4R Act") has so drastically altered the regulatory scheme in a

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[11] In an effort to bolster their position, Petitioners, quoting selectively from the *Square D* decision, assert that the Second Circuit's analysis of *ATA* in *Square D* supports their argument that *Keogh* is rendered inapplicable when the ICC has expressly found a tariff to be unlawful. In reality, *Square D* undercuts Petitioners' position. In *Square D* the Second Circuit expressly found that *ATA* has not overruled *Keogh*. 760 F.2d at 1364 and n. 12. In addition, the language which Petitioners omitted from their quote of *Square D* states that "[a]ppellants read too much into the [*ATA*] opinion in asserting that this result overrules *Keogh* with respect to tariffs that have been approved. . . ." (*id.* at 1364). The Plan B rates at issue were approved by the ICC in 1980 and were cancelled by that agency prospectively only. The *Keogh* decision clearly precludes antitrust damage actions based on such rates, and the Seventh Circuit so held. Contrary to Petitioners' assertions, the Seventh Circuit's decision in this case is in harmony with *Square D*.

manner so as to render *Keogh* inoperable. Thus, Petitioners assert that the circumstance that mandated the result in *Keogh*—a pervasive regulatory scheme—is not present here. Petitioners also assert that a failure to apply the antitrust laws in this case will mean that shippers, such as Petitioners, "will be left without a remedy." Pets. Br. at 8. Although these issues can scarcely be considered of profound importance or far-reaching effect, the fact remains that Petitioners are wrong in these assertions.

The Seventh Circuit correctly held that the enactment of the 4R Act has not invalidated *Keogh*. In *Keogh* the Court recognized that the ICC's authority to prevent unjust rate discrimination was the "paramount purpose of Congress" in enacting the Interstate Commerce Act. 260 U.S. at 163. The 4R Act did not alter this statutory goal of uniformity. In this connection, the 4R Act did not modify those sections of the Interstate Commerce Act which prohibit discriminatory rates; indeed, under the 4R Act, the ICC's power to eliminate rate discrimination was fully preserved. 49 U.S.C. § 10711; S. Rep. No. 595, 94th Cong., 2d Sess. 148 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 163. In fact the shippers, including Pillsbury, invoked that authority in their challenges to the Plan B rates before the ICC. Recognizing these facts, the Seventh Circuit properly concluded that "[t]he 4R Act . . . has not so drastically altered the regulatory environment as to invalidate the principles operating behind the *Keogh* decision." (795 F.2d at 1312).[12]

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[12] Despite Petitioners' suggestions to the contrary, Congress did not divest the ICC of its preexisting jurisdiction to adjudicate challenges to the reasonableness of rates. Under the 4R Act, in rate reasonableness proceedings, the ICC must first determine whether the railroad has market dominance ("over the transportation to which the rate applies" (49 U.S.C. § 10709(b)). The market dominance test imposed by Congress was designed to direct the ICC's regulatory activities only in those "areas where the public interest needs protection"—that is, in those areas in which the market is

Petitioners raise the specter that a failure to apply the antitrust laws to this case will mean that rail carriers can set rates with impunity. Petitioners' argument is utterly without merit and is belied by *Keogh*, the regulatory scheme embodied in the Interstate Commerce Act, and the facts of this case. *Keogh* does not hold that rail carriers may fix rates with impunity. *Keogh* merely limits the remedies available to shippers who base their antitrust damage claims on rates duly filed with the ICC. *Keogh* holds that private antitrust plaintiffs may seek injunctive relief or avail themselves of the remedies under the Interstate Commerce Act, which provides for awards of damages in the form of reparations upon proof of actual injury. *Keogh* does not foreclose governmental enforcement through criminal and civil injunctive actions. *See Georgia v. Pennsylvania Ry. Co., supra; McLain v. Real Estate Board of New Orleans, supra.* The Second Circuit's decision in *Square D* also makes clear that private antitrust plaintiffs may pursue damages that are not inextricably tied to the level of ICC-regulated rates. *Square D*, 760 F.2d at 1365.

Further, the Interstate Commerce Act, which contains a detailed enforcement scheme for administering the explicit standards governing the rates charged by railroads, refutes Petitioners' argument that shippers are somehow without remedies. Under the Interstate Commerce Act, a railroad may not charge a rate that is unreasonably high or unreasonably low (49 U.S.C. § 10701a) or discriminatory (49 U.S.C. § 10741(a), (b)). Before a proposed rate becomes effective, the ICC on its own initiative or on complaint may suspend and investigate the proposed rate (§ 10707). If it concludes the rate is unlawful, the ICC may set aside the rate or prescribe a different rate

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not sufficiently competitive to insure just and reasonable rates. *See* S. Rep. No. 499, 94th Cong., 2d Sess. 47 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, Vol. 2, Legislative History 14, 62.

(§ 10704). After a rate becomes effective, the ICC may determine the lawfulness of the rate, either on its own initiative or on complaint (§ 11701(a)). The ICC in such a proceeding may set aside an unlawful rate, prescribe a different rate and award damages for past injury (§§ 10704(a)(1), 11705(b)(2)). Further, although the ICC in this case refused to do so, the *ATA* case established that in extraordinary circumstances the ICC may exercise its discretion to invoke the remedy of retroactive rate nullification. After closely reviewing the regulatory scheme, the court of appeals below correctly found that "the ICC still maintains extensive jurisdiction over railroad rates." (759 F.2d at 1313).

In addition, as the Seventh Circuit correctly found, the shippers' full participation in the regulatory process in this case, which Petitioners have blithely ignored, confirms that rail carriers "do not operate in a purely competitive market, but rather are subject to the persistent overview of the ICC" (*id.*). After the Plan B rates were filed, the shippers vigorously challenged the lawfulness of the Plan B rates before the ICC. The ICC ultimately found, however, that: the Plan B rates did not violate the substantive provisions of the Interstate Commerce Act; whatever procedural violation occurred was too insubstantial to merit retroactive nullification of Plan B; and the shippers had failed to demonstrate any injury resulting from the implementation of Plan B (365 I.C.C. at 898-901). The shippers did not appeal the ICC's decision. Thus, through the welter of assertions, this salient fact emerges with clarity: this case constitutes nothing more than an *ex-post facto* attempt on the part of Petitioners to subvert the regulatory process and undermine the statutory authority of the ICC which has approved the very rates which form the basis of the damage relief sought here. Under the circumstances of this case, a ruling that the Petitioners may recover antitrust damages based upon rates that were scrutinized and approved by the ICC

would create the very conflict between the regulatory scheme and the antitrust laws that *Keogh* was designed to prevent.

IV. The Seventh Circuit's Decision Is Correct And, In Any Event, Raises No Important Issue Requiring Review By This Court.

Petitioners attempt to transform the issue in this case into one of public importance by contending that review is warranted by this Court because the Seventh Circuit somehow misinterpreted the ratemaking obligations of the railroads. Petitioners emphasize that the railroads—not the ICC—determined what rates would be filed, and that the Seventh Circuit ignored this crucial point. Pets. Br. at 12. Petitioners' argument misconstrues the decision below and ignores the essential underpinnings of *Keogh*.

Under the Interstate Commerce Act, the initiative in setting rates has always rested with the railroads. *See* 49 U.S.C. § 10762(a)(1). The railroad defendants in *Keogh* initiated the rates at issue there (260 U.S. at 160), and this Court considered that fact of no relevance to its analysis. It is equally insignificant in this case. The key factor which the Seventh Circuit considered essential to its analysis is that the ICC approved the Plan B rates as lawful under the substantive provisions of the Interstate Commerce Act. 759 F.2d at 1315. Under the Act, the carriers were entitled to charge the Plan B rates during the ICC's investigation and to charge the rates after the ICC's 1980 decision that the rates were lawful. The regulatory scheme embodied in the Interstate Commerce Act would be undercut, if not destroyed, if shippers could circumvent adverse ICC decisions by declining to seek judicial review and instead instituting an antitrust action for damages. In view of such circumstances, the Seventh Circuit properly held that the antitrust laws would not be furthered and the regulatory scheme would be totally

frustrated if shippers could recover treble damages from carriers which had relied detrimentally on the ICC's decisions approving the very rates which are the basis for the damages sought.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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